UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED: July 17, 2001

CHRISTOPHER T. LIZZI,
Plaintiff-Appellee,

v.

ROBERT ALEXANDER; CHARLES THOMAS; PHILLIP WALLACE; ANTHONY JOHNSON; AL MCCOY; DENNISE KURTZ,
Defendants-Appellants, } No. 00-2103

and

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY; JACK BYRD; MICHAEL KURTZ,
Defendants.

UNITED STATES OF AMERICA,
Movant.

CHRISTOPHER T. LIZZI,
Plaintiff-Appellant,

v.

ROBERT ALEXANDER; CHARLES THOMAS; PHILLIP WALLACE; ANTHONY JOHNSON; AL MCCOY; DENNISE KURTZ; WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY; JACK BYRD,
Defendants-Appellees, } No. 00-2104

and

MICHAEL KURTZ,
Defendant.

UNITED STATES OF AMERICA,
Movant.

CHRISTOPHER T. LIZZI,
Plaintiff-Appellee,

v.

ROBERT ALEXANDER; CHARLES THOMAS; PHILLIP WALLACE; ANTHONY JOHNSON; AL MCCOY; DENNISE KURTZ,
Defendants-Appellants, } No. 00-2126

and

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY; JACK BYRD; MICHAEL KURTZ,
Defendants.

UNITED STATES OF AMERICA,
Movant.

On Petition for Rehearing and Rehearing En Banc

The appellee's petition for rehearing and rehearing en banc was submitted to this court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Conner
CLERK

PUBLISHED

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FOR THE FOURTH CIRCUIT

CHRISTOPHER T. LIZZI,
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UNITED STATES OF AMERICA,
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No. 00-2103

CHRISTOPHER T. LIZZI,
Plaintiff-Appellant,

v.

ROBERT ALEXANDER; CHARLES THOMAS; PHILLIP WALLACE; ANTHONY JOHNSON; AL MCCOY; DENNISE KURTZ; WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY; JACK BYRD,
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MICHAEL KURTZ,
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UNITED STATES OF AMERICA,
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No. 00-2104

CHRISTOPHER T. LIZZI,
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and

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY; JACK BYRD; MICHAEL KURTZ,
Defendants.

UNITED STATES OF AMERICA,
Movant.

No. 00-2126

Appeals from the United States District Court
for the District of Maryland, at Greenbelt.
Deborah K. Chasanow, District Judge.
(CA-98-2660-DKC)

Argued: April 4, 2001

Decided: June 20, 2001

Before WILKINSON, Chief Judge, and LUTTIG and GREGORY, Circuit Judges.

Affirmed in part, reversed in part, and remanded by published opinion. Chief Judge Wilkinson wrote the opinion, in which Judge Luttig and Judge Gregory joined.

COUNSEL

ARGUED: Gerard J. Stief, Associate General Counsel, WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, Washington, D.C., for Appellants. Paul Francis Evelius, WRIGHT, CONSTABLE & SKEEN, L.L.P., Baltimore, Maryland, for Appellee. **ON BRIEF:** Cheryl C. Burke, General Counsel, Robert J. Kniaz, Deputy General Counsel, Sonia A. Bacchus, Assistant General Counsel, WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, Washington, D.C., for Appellants.

OPINION

WILKINSON, Chief Judge:

In this case, we must decide whether the Eleventh Amendment shields the Washington Metropolitan Area Transit Authority (WMATA), an agency created by interstate compact, from plaintiff Christopher Lizzi's assertions that the agency violated the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 et seq. (1994). We also must decide the related question of whether sovereign immunity bars Lizzi's allegation that several individual employees of WMATA violated the FMLA and are thus subject to personal liability for the alleged damages. The district court held that the Eleventh Amendment bars Lizzi's claims against WMATA, but that the FMLA permits Lizzi to bring an action against the employees of WMATA in their individual capacities. Because sovereign immunity extends to WMATA, and because the claims against the WMATA employees are in reality claims against the agency itself, we affirm in part, reverse in part, and remand with directions to dismiss the action.

I.

A.

Plaintiff Christopher Lizzi worked as a bus wheelchair lift mechanic for WMATA until September, 1997. WMATA fired Lizzi for allegedly combining sick days and vacation leave to miss work for

the entire summer. WMATA maintained that Lizzi fabricated his sick leave and did not submit to a medical exam, as required by the agency's policies. Lizzi contested this, and filed suit under the FMLA alleging that WMATA terminated him in violation of the Act.

Lizzi sued WMATA as well as seven individual supervisors at WMATA. The complaint stated that "Plaintiff Christopher T. Lizzi sues defendants Washington Metropolitan Area Transit Authority, Robert Alexander, Charles Thomas, Anthony Johnson, Michael Kurtz, Phillip Wallace, Al McCoy, and Jack Byrd." The complaint further declared that the individual defendants "have, at all relevant times, been employees of WMATA." The complaint also noted the supervisory positions of some of these defendants. McCoy and Byrd were Garage Shift Supervisors; Johnson oversaw the Garage Shift Supervisors; Alexander was WMATA's Absenteeism Supervisor; and Kurtz was WMATA's Bus Maintenance Superintendent. The complaint did not specify the positions of either Thomas or Wallace. Lizzi asked for, *inter alia*, reinstatement, back pay, damages, and an order prohibiting the defendants from violating the FMLA.

The district court granted summary judgment for WMATA on Eleventh Amendment grounds, but kept the individual defendants in the case. The lower court held that the WMATA compact does not waive the agency's Eleventh Amendment immunity, and that the FMLA is not a valid exercise of Congress' Fourteenth Amendment, § 5 power. But the court also held that the FMLA specifically defines "employer" to include supervisors, and thus the plain language of the FMLA authorizes suits against the individual employees in their individual capacities. The district court certified for interlocutory appeal the issues of WMATA's waiver of immunity and the liability of the individual defendants under the FMLA. WMATA appeals the decision to keep the individual supervisors in the case, and Lizzi cross-appeals the district court's decision that the compact does not waive WMATA's sovereign immunity.

B.

WMATA is an interstate compact agency and instrumentality of Maryland, Virginia, and the District of Columbia. Its purpose is to ensure the proper functioning and operation of a mass transit system

in the Washington, D.C. metropolitan area. *See Morris v. WMATA*, 781 F.2d 218, 219 (D.C. Cir. 1986). WMATA receives approximately 44% of its budget from the signatory states. The WMATA compact was approved by Congress in 1966. *See* Washington Metropolitan Area Transit Authority Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966).

Three sections of the compact are at the heart of this case. First, § 12 states that WMATA may "[s]ue and be sued." *Id.* at 1328. Second, § 80 declares that WMATA

> shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agent [sic] committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority. Nothing contained in this title shall be construed as a waiver by the District of Columbia, Maryland, Virginia, and the counties and cities within the zone of any immunity from suit.

Id. at 1350. Third, § 81 says in pertinent part:

> The United States District Courts shall have original jurisdiction, concurrent with the Courts of Maryland and Virginia, of all actions brought by or against [WMATA] and to enforce subpoenas issued under [this compact]. Any such action initiated in a State Court shall be removable to the appropriate United States District Court.

Id.

II.

A.

We note at the outset that WMATA possesses Eleventh Amendment immunity. The signatories of the compact intended to confer

Eleventh Amendment immunity on WMATA. *See Delon Hampton & Assoc. v. WMATA*, 943 F.2d 355, 359 (4th Cir. 1991). Further, both this circuit and the D.C. Circuit have held that Eleventh Amendment immunity may attach to WMATA's actions. *See id.* at 359; *Morris*, 781 F.2d at 220. WMATA is a state agency, subject to all the benefits and liabilities of a state itself, including sovereign immunity. *See Morris*, 781 F.2d at 219-20. It does not matter that WMATA was created by interstate compact, as opposed to being an agency of one state alone. *See Delon Hampton*, 943 F.2d at 359; *Jones v. WMATA*, 205 F.3d 428, 432 (D.C. Cir. 2000).

In *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994), the Supreme Court held that the Port Authority Trans-Hudson, an interstate compact entity, could not claim sovereign immunity. *See Hess*, 513 U.S. at 52-53. But the Court in *Hess* relied heavily on the fact that the Port Authority did not receive any funding from any state. Instead, it was a "self-sustaining" agency. *Id.* at 50. Indeed, the Court in *Hess* specifically distinguished the Port Authority from WMATA because WMATA was not self-sufficient. *Id.* at 49-50. Thus, the conferral of Eleventh Amendment immunity on WMATA "is compatible" with the holding in *Hess*. *Id.* at 50 n.20.

B.

Lizzi argues that under *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990), §§ 12 and 81 of the WMATA Compact read together effect a waiver of the agency's Eleventh Amendment immunity.

In *Feeney*, the Supreme Court ruled that an interstate compact entity, the Port Authority Trans-Hudson, had given its consent to suit in federal court. *See* 495 U.S. at 308-09. The statutory consent to suit provision in *Feeney* proclaimed that the states gave "consent to suits, actions, or proceedings of any form or nature at law, in equity or otherwise . . . against the Port of New York Authority." *Id.* at 306 (internal quotations omitted) (alteration in original). This provision standing alone, although "broadly framed," may have reflected "only a State's consent to suit in its own courts." *Id.* The Court thus looked at the venue provision of the compact, which stated that venue "shall be laid within a county or judicial district, established by one of said

States or by the United States . . . ." *Id.* at 307 (internal quotations omitted). Since the venue provision explicitly referred to federal courts, the Court held that the statutory consent to suit provision must encompass both federal and state courts. *See id.* at 307-09.

Lizzi argues that the similar provisions in the WMATA compact also effect a waiver of Eleventh Amendment immunity. Section 12 states that WMATA may "[s]ue and be sued." 80 Stat. at 1328. And § 81 makes clear that venue is proper in federal court. Thus, Lizzi maintains that under the reasoning of *Feeney*, WMATA must have waived its Eleventh Amendment immunity.

We disagree. Even were we to assume that WMATA's consent to suit provision is coextensive with the broader consent to suit provision in *Feeney*, Lizzi's argument has one fatal flaw: § 80 of the WMATA compact "specifically and expressly delineates the scope of WMATA's consent to be sued." *Morris*, 781 F.2d at 222 n.3. *Feeney* is not applicable here because it did not confront the situation in this case — a compact containing another clause specifically addressing the extent to which an agency waives its sovereign immunity. *Morris* involved a suit brought by an officer contending that WMATA discriminatorily discharged him. The *Morris* court disallowed the plaintiff's suit, even though the case arose under federal law, because § 80 did not waive WMATA's Eleventh Amendment immunity. *See id.* at 219-21. Since *Morris*, the District of Columbia Circuit has consistently held that the WMATA compact does not waive the agency's Eleventh Amendment immunity. *See, e.g., Jones*, 205 F.3d at 432 (suit brought under the ADEA dismissed due to WMATA's Eleventh Amendment immunity); *Beebe v. WMATA*, 129 F.3d 1283, 1285-86 (D.C. Cir. 1997) (suit alleging, *inter alia*, constructive discharge dismissed due to WMATA's sovereign immunity); *Souders v. WMATA*, 48 F.3d 546, 551 (D.C. Cir. 1995) (nuisance suit dismissed due to WMATA's Eleventh Amendment immunity); *Sanders v. WMATA*, 819 F.2d 1151, 1153-56 (D.C. Cir. 1987) (suit alleging negligent termination and violation of federal statute dismissed due to WMATA's sovereign immunity).

Lizzi argues in response to this multitude of cases that the D.C. Circuit is wrong, and that § 80 is applicable only to claims arising under state law. We agree with the *Morris* line of cases, however.

Any waiver of Eleventh Amendment immunity must be clear and unequivocal. *See Edelman v. Jordan*, 415 U.S. 651, 673 (1974). The text of § 80 indicates that the WMATA compact provides only for a limited waiver of sovereign immunity. The compact explicitly waives WMATA's sovereign immunity for breaches of contract and for torts "committed in the conduct of any proprietary function." 80 Stat. at 1350. There is no contention that the exercise of authority at issue in this suit was in any sense a tort or a contract "committed in the conduct of any proprietary function." Rather, hiring, training, and supervision practices are governmental functions. *See Beebe*, 129 F.3d at 1287. This case therefore does not fit within the scope of WMATA's limited waiver of sovereign immunity.

The compact evinces an intent that the agency does not waive its immunity in all *other* cases. It is thus unavailing to argue that §§ 12 and 81 effected a broad waiver of Eleventh Amendment immunity when § 80 makes so clear the limited nature of any such waiver. Reliance solely upon the sue and be sued clause and the venue clause, as Lizzi urges us to do, "would be particularly inappropriate" in this case because "another section of the Compact, § 80," delineates the entire scope of WMATA's waiver of its sovereign immunity. *Morris*, 781 F.2d at 222 n.3. Lizzi cannot use the combination of §§ 12 and 81 to create a waiver that § 80 itself does not provide. Indeed, "it is a commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). Finally, we agree with the D.C. Circuit that nothing in the WMATA compact purports to waive the agency's Eleventh Amendment immunity in all cases under federal law. *See Jones*, 205 F.3d at 430; *Morris*, 781 F.2d at 221. Our reading of the compact is not only faithful to its language; it also renders circuit law consistent in the two federal circuits most likely to hear cases in which WMATA is a party.

C.

The only remaining reason why WMATA would be subject to suit is if the FMLA validly abrogates the agency's Eleventh Amendment immunity. The district court ruled that the FMLA did not abrogate WMATA's Eleventh Amendment immunity. We agree.

The Supreme Court has enunciated a two-part test for determining whether an act of Congress abrogates a state's Eleventh Amendment

immunity. First, Congress must unequivocally declare an intent to abrogate. Second, Congress must act pursuant to a valid exercise of its power. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996). We assume for purposes of this decision that Congress has declared its unequivocal intent to abrogate. The FMLA states that an action may be maintained "against any employer (including a public agency) in any Federal or State court of competent jurisdiction. . . ." 29 U.S.C. § 2617(a)(2). *Cf. Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73-74 (2000) (holding that identical language in the Age Discrimination in Employment Act constitutes an unmistakably clear attempt by Congress to abrogate a state's Eleventh Amendment immunity).

Congress must also have the proper constitutional authority to abrogate, however. Since *Seminole Tribe*, the Court has made clear that Congress cannot abrogate Eleventh Amendment immunity using its Article I powers. *See, e.g., Board of Tr. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 962 (2001) ("Congress may not, of course, base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I."); *id.* (collecting cases since *Seminole Tribe*); *see also South Carolina State Ports Auth. v. Federal Mar. Comm'n*, 243 F.3d 165, 168 (4th Cir. 2001). Only under its Fourteenth Amendment, § 5 power can Congress validly abrogate a state's immunity from private suit. *See Garrett*, 121 S. Ct. at 962; *South Carolina Ports*, 243 F.3d at 177.

Legislation properly enacted under § 5 must be congruent and proportional to the Fourteenth Amendment injury being remedied. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997); *Kimel*, 528 U.S. at 81; *Garrett*, 121 S. Ct. at 963. The Supreme Court has held that both the Age Discrimination in Employment Act and the Americans With Disabilities Act were not validly enacted under Congress' § 5 power because "the remedy imposed by Congress" was not "congruent and proportional to the targeted violation." *Garrett*, 121 S. Ct. at 967-68 (ADA); *accord Kimel*, 528 U.S. at 82-83 (ADEA).

Thus, the issue here is whether the FMLA is congruent and proportional to the identified Fourteenth Amendment violation — employment discrimination on the basis of sex. The statute identifies gender discrimination as the constitutional harm to be remedied by the FMLA. The FMLA states that its purpose is to "minimize[ ] the

potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender neutral basis" and in a manner "consistent with the Equal Protection Clause of the Fourteenth Amendment." 29 U.S.C. § 2601(b)(4); *see also Chittister v. Department of Cmty. and Econ. Dev.*, 226 F.3d 223, 228 (3d Cir. 2000). In making this finding of purpose, Congress did not identify, as it is required to do, any pattern of gender discrimination by the states with respect to the granting of employment leave for the purpose of providing family or medical care. *See Garrett*, 121 S. Ct. at 964-65. As the Third Circuit has stated, "Notably absent is any finding concerning the existence, much less the prevalence, in public employment of personal sick leave practices that amounted to intentional gender discrimination in violation of the Equal Protection Clause." *Chittister*, 226 F.3d at 228-29.

Moreover, the FMLA is simply not narrowly tailored to redress the asserted Fourteenth Amendment harm of gender discrimination. While Congress has broad latitude to act, it does not have the constitutional power to pass such a sweeping statute on the basis of the purported Fourteenth Amendment violation. The difficulty is that the FMLA bestows on private parties a broad-ranging substantive entitlement to sue states for a range of personnel practices without any finding that the states were culpable of an Equal Protection violation to begin with. That the FMLA sweeps far beyond the redress of gender discrimination is evident in the breadth of the entitlement to subject a state to suit. Instead of attempting to remedy the identified violation, Congress attempted to redefine the right. As the district court noted, the FMLA "exceeds Congress's power under the Fourteenth Amendment by attempting to define specifically what equal protection means rather than merely remedy an existing constitutional violation."

The FMLA "does much more than require nondiscriminatory sick leave practices; it creates a substantive entitlement to sick leave." *Chittister*, 226 F.3d at 229. The Act imposes on the states a federally devised standard entitling employees to "12 workweeks of leave during any 12-month period." 29 U.S.C. § 2612(a)(1). The Act also allows any person to subject a state to private suit for violating the statute. *Id.* § 2617(a)(2). The Fourteenth Amendment does not allow Congress to prescribe a privately enforceable guarantee to all state

employees of at least twelve weeks of leave per year. *See, e.g., Chittister*, 226 F.3d at 228-29; *Garrett v. University of Ala. at Birmingham Bd. of Tr.*, 193 F.3d 1214, 1219 (11th Cir. 1999), *rev'd on other grounds*, 121 S. Ct. at 968.

In sum, the substantive requirements of the FMLA are "'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Kimel*, 528 U.S. at 82 (quoting *City of Boerne*, 521 U.S. at 532). Indeed, every circuit to examine this issue has identified this fundamental lack of proportionality as a main reason why the FMLA is not a valid abrogation of a state's Eleventh Amendment immunity from suit. *See, e.g., Townsel v. Missouri*, 233 F.3d 1094, 1095 (8th Cir. 2000); *Chittister*, 226 F.3d at 229 (legislative scheme not "tailored to preventing any [constitutional] harm"); *Kazmier v. Widmann*, 225 F.3d 519, 526 (5th Cir. 2000) ("Broad, prophylactic legislation must be congruent with and proportional to *actual, identified* constitutional violations by the States."); *Sims v. University of Cincinnati*, 219 F.3d 559, 566 (6th Cir. 2000); *Hale v. Mann*, 219 F.3d 61, 69 (2d Cir. 2000) ("There is no evidence that this conferment of federally protected leave is tailored to remedy sex-based employment discrimination."); *Garrett*, 193 F.3d at 1219. We agree with all of our sister circuits. The FMLA does not validly abrogate a state's Eleventh Amendment immunity from suit.

III.

WMATA and the individual defendants appeal the district court's determination that the FMLA allows suits against individual supervisors in their individual capacities. In support of this result, the district court pointed to the fact that the FMLA's definition of "employer" includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." 29 U.S.C. § 2611(4)(A)(ii)(I). WMATA argues preliminarily, however, that the individual defendants in essence have been sued for damages in their official capacities rather than their individual capacities.[1]

[1]In view of our resolution of this issue, we do not address the question of whether, in an action against a private employer, an individual supervisor is subject to personal liability for violating the FMLA.

"Only States and state officers acting in their official capacity are immune from suits for damages in federal court." *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. ___, No. 99-1848, slip op. at 10 n.10 (May 29, 2001) (citing *Edelman v. Jordan*, 415 U.S. 651 (1974)). The Supreme Court has declared that the "Eleventh Amendment bars a suit against state officials when 'the state is the real, substantial party in interest.'" *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984) (quoting *Ford Motor Co. v. Department of Treas. of Ind.*, 323 U.S. 459, 464 (1945)). The Supreme Court has also made clear that a suit for damages against individual officers in their official capacities is treated like a suit against the state itself. *See, e.g., Pennhurst*, 465 U.S. at 101; *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997). Thus, if Lizzi has sued the individual supervisors in their official capacities, the employees would be entitled to the same Eleventh Amendment immunity that WMATA itself retains.

Here, Lizzi's complaint makes clear that the state is the real party in interest. Lizzi's complaint named seven individuals as well as WMATA. The complaint, however, never stated whether the individuals were being sued in their official or individual capacities. Moreover, the allegations in the complaint recounted how WMATA *as an agency* decided to fire Lizzi. Any actions of the individual defendants were tied inextricably to their official duties. For example, the complaint recounted that "WMATA told [Lizzi]" that he was under investigation after "defendant Alexander, WMATA's Absenteeism Supervisor, recommended in writing to defendant Kurtz, WMATA's Bus Maintenance Superintendent, that plaintiff be terminated." The complaint made no showing of any ultra vires action taken by any individual employee. And a conclusory allegation that the "defendants" were motivated by "spite" and "ill will" is not enough, standing alone, to maintain an FMLA action against these supervisors in their individual capacities.

Indeed, even if Lizzi had actually used the phrase "individual capacity," his complaint could not stand. In *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 (1985), the Supreme Court emphasized that the mere incantation of the term "individual capacity" is not enough to transform an official capacity action into an individual capacity action. *See* 475 U.S. at 543. Here, Lizzi's complaint is

weaker than *Bender*'s because the complaint does not even state that the defendants are being sued in their individual capacities. Rather, the complaint used the defendants' work address as the address of record and spoke of the individual defendants by name only passingly and in relation to the jobs that they performed at WMATA. The other court to examine the individual-capacity question with regard to FMLA suits against state employees had no difficulty in holding that the real party in interest in these lawsuits is the state, not the individual defendants. *See Kazmier*, 225 F.3d at 533 n.65.

Lizzi argues, however, that *Hafer v. Melo*, 502 U.S. 21 (1991), requires that the claims against the individual supervisors should be treated as an individual-capacity suit. In *Hafer*, the Court held that 42 U.S.C. § 1983 permits individual capacity suits against state officers for damages arising from official acts. *See Hafer*, 502 U.S. at 23. We think, however, that *Hafer* is inapposite. *Hafer* was based on "the broad language of § 1983." *Id.* at 28. Unlike § 1983, the FMLA is not focused against those who carry the "badge of authority of a State." *Hafer*, 502 U.S. at 28 (internal quotations omitted). Whereas § 1983 is intended as a broad enforcement vehicle to bring suit against state officials for violations of all other federal statutory and constitutional rights, the FMLA is focused on creating a set of statutory entitlements in its own right. *See, e.g.*, 29 U.S.C. § 2612(a). Moreover, the text of the FMLA does not contain the well established system of immunities which § 1983 defendants can assert.[3]

Other considerations militate against interpreting the FMLA to hold individual state employees personally liable for official acts. To hold that individual supervisors, as "employers," may be sued under the statute while also holding that the Constitution prohibits the state

[3]The issue of whether the FMLA's remedial scheme is so comprehensive that it preempts the use of § 1983 actions is of course not before us. *See, e.g., Blessing v. Freestone*, 520 U.S. 329, 341 (1997) (Congress may forbid recourse to § 1983 by, *inter alia*, "creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983."); *Kilvitis v. County of Luzerne*, 52 F. Supp.2d 403, 419 (M.D. Pa. 1999) (The FMLA provides "comprehensive remedial measures that evinces Congress' intent to foreclose the use of a § 1983 action.").

itself from being sued would undermine the Supreme Court's decisions in *Garrett*, *Kimel*, and *Seminole Tribe*. Plaintiffs like Lizzi would easily be able to evade the Eleventh Amendment prohibition against suing a state merely by naming the individual supervisor as the employer. We refuse to create such an anomaly. The state would still suffer the indignity of having each discrete decision regarding personnel or organizational matters subject to second-guessing by a federal court. "The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleadings." *Coeur d'Alene*, 521 U.S. at 270.

A rule permitting such individual liability would do nothing more than "adhere to an empty formalism and [would] undermine the principle, reaffirmed . . . in *Seminole Tribe*, that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction." *Id.* Because WMATA enjoys Eleventh Amendment immunity for claims brought under the FMLA, the individual supervisors under the FMLA are protected by that same immunity. *See Beebe*, 129 F.3d at 1288-89 (individual supervisors of WMATA have immunity for alleged wrongful termination of employee). WMATA's Eleventh Amendment immunity transfers to the supervisors because the individuals were sued in their official capacities for their official acts.

IV.

The WMATA compact does not waive the agency's Eleventh Amendment immunity from suit. And the FMLA does not validly abrogate a state's Eleventh Amendment immunity. Consequently, Lizzi's claims against WMATA must be dismissed for lack of subject matter jurisdiction. Similarly, Lizzi's claims against the individual supervisors at WMATA must be dismissed as well because these claims were in reality an action against the agency itself. The FMLA does not permit a plaintiff to evade the strictures of sovereign immunity by suing the individual defendants as the employer rather than the state. For the foregoing reasons, the judgment of the district court is affirmed in part, reversed in part, and remanded with directions to dismiss it.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHRISTOPHER T. LIZZI	*	CIVIL ACTION NO.:
Plaintiff	*	DKC 98-2660
v.	*	
WMATA, et al.	*	
Defendant	*	

* * * * * * * * *

ORDER

All parties in this employment action have moved for reconsideration of this court's Order of May 12, 2000; which granted in part and denied in part Defendants' motion for summary judgment and denied Plaintiff's motion for partial summary judgment. The court has reviewed the parties' papers and now rules without a hearing. Local Rule 105.6. The court will DENY the motions for reconsideration. The arguments presented in the motions were carefully considered and rejected by this court during its resolution of the summary judgment motions. The most recent motions do not sway the court to alter its original decision.

However, the court recognizes that there is "substantial ground for difference of opinion" on the "controlling questions" of both individual liability under the Family and Medical Leave Act of 1993 ("FMLA") and waiver of immunity under the Washington Metropolitan Area Transit Authority ("WMATA") interstate compact. See 28 U.S.C. § 1292(b). Defendants have moved the court to certify the issue of individual liability for review by the Fourth Circuit, and Plaintiff asks that, if the court grants this

motion, it include the issue of waiver of immunity. An immediate appeal would resolve these complex matters of law, conserve judicial resources, and "materially advance the ultimate termination of the litigation." Id.

Accordingly, IT IS this 20th day of July, 2000, by the United States District Court for the District of Maryland, ORDERED that:

1. Defendants' Motion for Reconsideration BE, and the same hereby IS, DENIED;

2. Plaintiff's Motion for Reconsideration BE, and the same hereby is, DENIED;

3. Plaintiff's Motion for Substitution of Dennise M. Kurtz, personal representative of the estate of Michael Kurtz, for Defendant Michael Kurtz BE, and same hereby IS, GRANTED;

4. This court's orders resolving the issues of WMATA's waiver of immunity and the liability of individual defendants under the FMLA involve controlling questions of law as to which there are substantial grounds for difference of opinion, and, as to each, an immediate appeal pursuant to 28 U.S.C. § 1292(b) may materially advance the ultimate termination of the litigation;

5. This case BE, and the same hereby IS, STAYED pending resolution of the applications for an interlocutory appeal to the Court of Appeals for the Fourth Circuit; and

6. The Clerk is directed to transmit a copy of this Order to counsel for the parties.

/S/

DEBORAH K. CHASANOW
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHRISTOPHER T. LIZZI	*	CIVIL ACTION NO.:
Plaintiff	*	DKC 98-2660
v.	*	
WMATA, et al.	*	
Defendant	*	

* * * * * * * * *

Plaintiff Christopher Lizzi brings this employment discrimination action against Defendants Washington Metropolitan Area Transit Authority ("MWATA") and six individual WMATA employees.[1] 'The original complaint contained six counts, but subsequently Plaintiff dismissed all claims except one, which alleged that Defendants violated Plaintiff's rights under the Family and Medical Leave Act of 1993 ("FMLA"). All parties have moved for summary judgment on the remaining FMLA claim. The issues are fully briefed, [2] and the court now rules, no hearing being deemed necessary. Local Rule 105.6. For the reasons stated more fully below, the court will GRANT WMATA's motion and DENY the individual defendants' and Plaintiff's motions for summary judgment.

I. Background

[1] On April 12, 2000, a suggestion of death as to Defendant Michael Kurtz was entered on the record. According to Fed. R. Civ. P. 25, Plaintiff has 90 days to order the substitution of a proper party or else the action shall be dismissed as to Defendant Kurtz.

[2] The court granted the motion of the United States to intervene in this case on February 15, 2000, but the United States declined to file a memorandum related to these motions.

WMATA employed Plaintiff as a lift mechanic to repair handicap equipment on WMATA vehicles from June 16, 1981 to September 5, 1997. The events relevant to this litigation occurred during the summer of 1997. According to Plaintiff, on July 31, 1997, he injured his right ankle while on vacation, Plaintiff submitted to his employer a certificate from his physician that he would be unable to work for approximately four weeks, until August 24, 1997. Furthermore, while absent from work due to the ankle injury, Plaintiff allegedly began to experience pain in the gums of his mouth. In order to treat the pain from gum inflammation, Plaintiff's dentist prescribed Percodan. The dentist, who was also Plaintiff's father, filled out another certificate of medical absence, stating that Plaintiff should not work until August 23, 1997 because of the side effects from the Percodan.

Apparently, at this time, Plaintiff's supervisor began to investigate Plaintiff's absences, suspecting that in 1997 and in prior years Plaintiff used a combination of vacation and sick leave to take an extended "summer vacation."[3] Plaintiff's employer next demanded that Plaintiff appear for a medical examination, which he did. The WMATA physician found no reason for Plaintiff to be absent from work and recommended an independent medical examination. Plaintiff did not submit to the independent medical examination as scheduled on August 19, and on September 5, 1997, WMATA terminated Plaintiff for failure to comply with the directions to submit to a medical examination. On September 24, 1997, a WMATA employee, unaware of the termination or the allegations of falsified medical conditions, retroactively designated Plaintiff's absences from August 9 through August 23 as "approved FMLA leave."

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[3] In 1994, Plaintiff was absent from July 4 to September 9; in 1995, from June 16 to September 5; in 1996, from June 24 to September 3; and in 1997 from June 27 until his termination on September 5.

Plaintiff filed this suit on August 7, 1998. Plaintiff alleges that WMATA supervisors failed to provide him with adequate information about his rights under FMLA, and that his termination for failure to appear at an appointment during approved FMLA leave was in violation of that statute.

II. Eleventh Amendment Immunity

Congress created WMATA in 1966 by approving an interstate compact of the States of Maryland and Virginia and the District of Columbia for the purpose of operating commuter trains and buses in the Washington D.C. metropolitan area. Defendant WMATA moves for summary judgment on the claims against it based upon Eleventh Amendment immunity. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Despite its limited language, in Hans v. Louisiana, 123 U.S. 1 (1890), the Supreme Court held that the Eleventh Amendment forbids a federal court from entertaining a suit by a citizen against any state, even his own. "After reviewing the constitutional debates concerning the scope of Art. III, the Court determined that federal jurisdiction over suits against unconsenting States, 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" Pennhurst State Sch. & Hospl. V. Halderman, 465 U.S. 89, 98 (1984) (citing Hans, 123 U.S. at 15).

A. Is WMATA entitled to Eleventh Amendment immunity?

Although the Supreme Court has not considered any cases involving WMATA specifically, the Court has considered whether an analogous entity, the Port Authority of New York and New Jersey, enjoys Eleventh Amendment immunity. Port Authority operates transportation-related services and was created pursuant to a bistate compact. Furthermore, Congress consented to the compact:

> Bistate entities occupy a significantly different position in our federal system than do the States themselves. The States, as separate sovereigns, are the constituent elements of the Union. Bistate entities, in contrast, typically are creations of three discrete sovereigns: two States and the Federal Government.

Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 40 (1994). The Court in Hess stated its general approach to interstate entities: "We would presume the Compact Clause agency does not qualify for Eleventh Amendment immunity '[u]nless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose.'" Id. at 43-44. The Court looked to whether the compact types the entity as a state agency; whether the commissioners are state appointees; whether the state exerts control in other manners; the characterization by state courts; and finally and foremost, whether the State bears legal liability for wrongful conduct by the entity's employees. Id. at 44-48. These factors together should guide this court in its immunity analysis.

The D.C. Circuit has consistently held that WMATA enjoys immunity under the Eleventh Amendment form suit in federal court based on its performance of governmental functions. Jones v. WMATA, 205 F.3d 428, 432 (D.C. Cir. 2000); Morris v. WMATA, 781 F.2d 218, 219 (D.C. Cir. 1986). In Morris, the court held that Section 80 of the WMATA Compact clearly demonstrates that Maryland and Virginia intended to confer sovereign immunity upon WMATA. Section 80 provides that WMATA "shall be liable for its contracts and for its torts ...committed in the conduct of any proprietary function, ...but shall not be liable for any torts occurring in the performance of a governmental function." MD. CODE ANN., TRANSP. I § 10-204 (1999 Supp.). The D.C. Circuit held that a reasonable interpretation of this section would be that WMATA enjoys sovereign immunity except in contract or tort actions stemming from the performance of proprietary functions. Id. at 227. Moreover, the Morris court found that other factors supported the conclusion that the States conferred Eleventh Amendment immunity upon WMATA. Other indicia of immunity include the obligation of the States to pay in effect any judgment against WMATA and the degree of control exercised by the States over WMATA through removal powers on the Board.[4] Id. at 227-28. Following the reasoning of Morris this court agrees that WMATA enjoys Eleventh Amendment immunity.[5]

B. Did WMATA waive its Eleventh Amendment immunity?

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[4] Defendants submitted an affidavit of Ms. Antoinette Martin, a manager in the cost allocation offices of WMATA, stating that the financial analysis presented in Morris is still accurate. In fact, according to Ms. Martin, the State of Maryland bears a greater portion of WMATA's financial burden now than in 1986.

[5] In Hess, the Supreme Court cited favorably the D.C. Circuit's decision in Morris. Hess, 513 U.S. at 49-50 & n.20 ("The decision in Morris is compatible with our approach....Thus, we establish no 'per se rule that the Eleventh Amendment never applies when States act in concert.'").

Plaintiff argues that WMATA waived its immunity under the Eleventh Amendment and consented to suit in federal court. In Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990), the Court assumed arguendo that a suit against Port Authority possessed. The Court found waiver in two provisions of the compact: the consent to suit provision and the venue provision. The first provided that the States "consent to suits, actions, or proceedings of any form or nature at law, in equity or otherwise ... against the Port of New York Authority." The second conditioned "[t]he foregoing consent" upon venue that "shall be laid within a county or judicial district, established by one of said States or by the United States, and situated wholly or partially within the Port of New York District." The Court reasoned:

> Petitioner does not deny that the phrase "judicial district, established ...by the United States" refers to the United States District Courts, but rather argues that the reference to venue cannot shape our construction of the general consent to suit provision. Although one might not look first to a venue provision to find evidence of waiver of sovereign immunity, we believe that the provision directly indicates the extent of the States' waiver embodied in the consent provision. The States passed the venue and consent to suit provisions as portions of the same Acts that set forth the nature, timing, and extent of the States' consent to suit. The venue provision expressly refers to and qualifies the more general consent to suit provision .... The venue

> provision would hardly qualify "[t]he foregoing consent" unless the States intended that consent to include suits in federal court.

Id. At 307-08.

Plaintiff ignores an important distinction between this case and Feeney. In its compact, WMATA has only partially waived its immunity. Although a sovereign's immunity may be waived, Pennhurst, 465 U.S. at 99, that consent must be unequivocally expressed. Edelman v. Jordan, 415 U.S. 651, 673 (1974). Unlike the first provision in Port Authority's compact which provides for consent to suits "of any form or nature at law," Section 80 of the WMATA's Compact only provides for liability "for its contracts and for its torts ... committed in the conduct of any proprietary function." Plaintiff points to Section 81, WMATA's venue provision, which allows original jurisdiction in federal court. However, Sections 80 and 81 must be read as parts of a coherent whole. It is insensible to argue that the states intended to limit waiver of sovereign immunity in Section 80 and subsequently waive all immunity in Section 81. See Wainwright v. WMATA, 958 F. Supp. 6, 8-9 (D.D.C. 97).

Case law also establishes that the actions forming the basis for Plaintiff's suit are not "proprietary functions" encompassed by Section 80's waiver of immunity. The activity at issue here—the supervision and termination of an employee—is a governmental function, and therefore WMATA enjoys sovereign immunity on that claim. A duty is governmental if it is discretionary, involving judgment, planning or policy decisions. Burkhardt v. WMATA, 112 F.3d 1207, 1216 (D.C. Cir. 1997). Hiring, training and supervision practices are clearly established as a governmental function. Id. at 1217. A decision to terminate an individual for abuse of sick leave necessarily involves consideration of numerous factors (budgetary constraints,

experience, public perception, employer intuition) and choice, the key indicium of government function. See Beebe v. WMATA, 129 F.3d 1283, 1287 (D.C. Cir. 1997).

C. Did Congress abrogate WMATA's Eleventh Amendment immunity when it enacted the FMLA?

Although WMATA has not waived its Eleventh Amendment immunity, Congress may in some circumstances abrogate that protection. The determination whether Congress validly abrogated the states' Eleventh Amendment immunity turns on two questions: whether Congress "unequivocally expressed its intent" and whether Congress acted pursuant to a "valid exercise of power." Abril v. Virginia, 145 F.3d 182, 186 (4th Cir. 1998) (holding that Congress did not act pursuant to a valid exercise of power to abrogate in enacting the Fair Labor Standards Act).

Congress must demonstrate its intent to abrogate Eleventh Amendment immunity in an "unmistakably clear" legislative statement. Seminole Tribe v. Florida, 517 U.S. 44, 56 (1994). Congress clearly expressed an intention to abrogate the immunity of state governments when it included state and local governments as covered employers under the FMLA. See 29 U.S.C. § 2611(4)(A)(iii) ("employer" includes any "public agency"); 29 U.S.C. 203(x) ("public agency" includes "any agency of ... a State, or a political subdivision of a State"); see also Knussman v. State of Maryland, 935 F. Supp. 6f59, 662 (D. Md. 1996) (finding Congress unequivocally expressed its desire to abrogate in the FMLA).

However, in order to abrogate the States' sovereign immunity, Congress must also pass the Act at issue "pursuant to a valid exercise of power." Seminole Tribe, 517 U.S. at 58. The Supreme Court has held that only one constitutional provision provides authority to abrogate: Section Five of the Fourteenth Amendment. Id. at 59

(overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (plurality holding that Interstate Commerce Clause also provides authority to abrogate)).

The Fourteenth Amendment provides in relevant part:

> Section 1.... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws....
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Section 5 gives Congress the power to secure "perfect equality of civil rights and equal protection of the laws against State denial or invasion." *Ex parte Virginia*, 100 U.S. 339 (1879). However, congressional power is limited to the "power 'to enforce,' not the power to determine what constitutes a constitutional violation." City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (holding the Religious Freedom Restoration Act of 1993 exceeded Congress' § 5 enforcement powers). In other words, the legislation at issue must be remedial, rather than substantive. Id. "The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch." Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 644 (2000).

To determine whether legislation is properly enacted under the Fourteenth Amendment, the court must ask if the statute (1) "may be regarded as an enactment to enforce the Equal Protection Clause"; (2) "is plainly adapted to that end"; and (3) "is not prohibited by but is consistent with the 'letter and spirit of the constitution." Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (internal quotations omitted); Abril, 145 F.3d at 187. The first prong is met in this case because Congress declared explicitly that the FMLA intended to promote the family "in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis." 29 U.S.C. § 2601(b)(4).

The second prong requires the court to determine whether there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." City of Boerne, 521 U.S. at 520. In Kimel, the Court recently found that the ADEA is not a proper exercise of power under the Fourteenth Amendment because "the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act." Kimel, 120 S. Ct. at 645. Similarly, the FMLA exceeds Congress's power under the Fourteenth Amendment by attempting to define specifically what equal protection means rather than merely remedy an existing constitutional violation. Faced with this issue, other courts have agreed that Congress did not act in this instance within the authority of the Fourteenth Amendment:

> In effect, Congress, inasfar as it purports to rely on the Fourteenth Amendment as the basis of the FMLA, is attempting to dictate that the Equal

> Protection Clause of the Fourteenth Amendment requires that employees be furnished twelve weeks of leave per year for the reasons set forth in the act. This is patently the sort of substantive legislation that exceeds the proper scope of Congress' authority under § 5.

Thomson v. Ohio State Univ. Hosp., 5 F. Supp.2d 574, 579 (S.D. Ohio 1998); see also Garrett v. University of Alabama, 193 F.3d 1214, 1219 (11th Cir. 1999); McGregor v. Goord, 18 F. Supp.2d 204, 208 (N.D.N.Y. 1998) ("In other words, rather than enforcing the Equal Protection Clause, the FMLA attempts to define what equal protection means: twelve weeks of leave for eligible employees for the purposes enumerated in the statute."); Driesse v. Florida Bd. of Regents, 26 F. Supp.2d 1328, 133 (M.D. Fla. 1998) ("thus, the FMLA mandates that not only are employers required to treat leave requests the same for both men and women, but they are required to provide a valuable economic benefit in the form of twelve weeks of leave."); Cohen v. Nebraska, 83 F. Supp.2d 1042, 1045 (D. Neb. 2000); Philbrick v. University of Connecticut, -- F. Supp.2d -, 2000 WL 329813, at *5 (D. Conn. 2000). The FMLA would only be a valid exercise of power under the Fourteenth Amendment if state employment decisions to provide less than twelve weeks of leave are unconstitutional. Therefore, Congress exceeded its power under § 5 and thus failed to abrogate Eleventh Amendment immunity.

III. Individual Liability

Plaintiff also brings his FMLA claim against six individual employees of WMATA in their individual capacities. The FMLA creates liability for "any employer" who interferes with or denies any rights

provided to an employee under the Act. An "employer" under the FMLA includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." 29 U.S.C. § 2611(4)(A)(ii)(I); see also 29 C.F.R. § 825.104(d). The plain language of the statute indicates that the FMLA authorizes suits against the individual in their individual capacity. For that reason, the majority of courts—including this one—have held that the FMLA allows individual liability. See, e.g., Donovan v. Agnew, 712 F.2d 1509, 1511 (D. Md. 1996). Therefore, the court will deny their motion for summary judgment.[6]

IV. Plaintiff's Motion for Summary Judgment

Plaintiff moved for summary judgment on his FMLA claim. The court cannot resolve this motion based upon the record at this time. Issues of fact remain to be resolved concerning the validity of Plaintiff's absence during the summer of 1997, the communication between Plaintiff and Defendants, whether his absence qualified as FMLA leave, the role played by each of the individual defendants in the supervision of Plaintiff and their responsibility for the alleged violation. Defendants dispute many facts set forth by Plaintiff in the complaint and his motions, and neither party has adequately addressed the substantive merits of the FMLA claim. In sum, summary judgment is not appropriate at this time.

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[6] The individual defendants claim that the WMATA compact confers immunity from suit upon its employees, citing Beebe v. WMATA, 129 F.3d 1283 (D.C. Cir. 1997). Beebe does not apply in this case. Beebe held only that WMATA officials enjoy absolute immunity from state-law tort actions where the conduct falls within the scope of employment and occurred in the exercise of governmental functions. This case does not involve a state-law tort claim, but rather an alleged violation of a federal employment statute.

V. Conclusion.

Because WMATA enjoys Eleventh Amendment immunity and has not waived that immunity in this instance and because the FMLA does not validly abrogate the States' sovereign immunity, the court must enter summary judgment in favor of WMATA. However, the individual defendants may be held liable under the FMLA. Accordingly, the court will GRANT WMATA'S motion and DENY the individual defendants' motion for summary judgment.

The court will also DENY plaintiff's motion for partial summary judgment. A separate Order will be entered.

DEBORAH K. CHASANOW
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHRISTOPHER T. LIZZI	*	CIVIL ACTION NO.:
Plaintiff	*	DKC 98-2660
v.	*	
WMATA, et al.	*	
Defendant	*	

* * * * * * * * *

ORDER

For the reasons stated in the accompanying Memorandum Opinion, IT IS this 12th day of May, 2000, by the United States District Court for the District of Maryland, ORDERED that:

1. Defendants' Motion for Summary Judgment BE, and the same hereby IS, GRANTED as to WMATA and DENIED as to the individual defendants;

2. Plaintiff's Motion for Partial Summary Judgment BE, and the same hereby IS, DENIED;

3. Judgment BE, and hereby IS, ENTERED in favor of Washington Metropolitan Area Transit Authority and against Christopher Lizzi on all claims;

4. A telephone conference is scheduled for May 30, 2000, at 9:00 a.m. to discuss further scheduling. Counsel for Plaintiff is directed to arrange and initiate the call to counsel for Defendants and the court; and

5. The Clerk is directed to transmit a copy of this Order and the accompanying Memorandum Opinion to counsel for the parties.

/S/
DEBORAH K. CHASANOW
United States District Judge